IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

OP.No. 4790 of 2003(T)

PETITIONER:

M/S. PALATHARA MOSAIC INDUSTRIES
PARUNNA, CHANGANACHERRY, REPRESENTED BY
P.M.JOSEPH, MANAGER

BY ADV. SRI.ARIKKAT VIJAYAN MENON
SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON

RESPONDENTS:

1. INTELLIGENCE OFFICER -IB,
DEPARTMENT OF COMMERCIAL TAXES, KOTTAYAM

2. DEPUTY COMMISSIONER OF COMMERCIAL TAXES,
KOTTAYAM

3. COMMISSIONER OF COMMERCIAL TAXES,
OPPOSITE MUSEUM, THIRUVANANTHAPURAM

4. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT, TAXES DEPARTMENT,
KERALA GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM

BY GOVERNMENT PLEADER SRI GOVINDAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 24/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.NO.4790/2003

ORDER ON CMP.NO.3192/2003 IN OP.NO.4790/2003

DISMISSED

24/5/2007 Sd/- P.R.RAMAN, JUDGE.

APPENDIX

PETITIONER'S EXTS:

EXT.P1 COPY OF THE LETTER TO THE INTELLIGENCE OFFICER, KOTTAYAM BY THE DIRECTOR, ST. THOMAS HOSPITAL, CHETHIPUZHA, CHANGANACHERRY DTD. 17/1/2000.

EXT.P2 COPY OF THE MEASUREMENT SHEET.

EXT.P3 COPY OF THE WRITTEN OBJECTION FILED BY THE PETITIONER DTD. 7/5/2000.

EXT.P4 COPY OF THE ORDER OF THE INTELLIGENCE OFFICER-IB, COMMERCIAL TAXES, KOTTAYAM DTD. 3/11/2000.

EXT.P5 COPY OF THE LETTER OF FORMER DIRECTOR TO THE IST RESPONDENT DTD. 2/11/2000.

EXT.P6 COPY OF THE ORDER OF THE DY. COMMISSIONER, COMMERCIAL TAXES, KOTTAYAM DTD. 2/1/2001.

EXT.P7 COPY OF THE NOTICE OF THE 3RD RESPONDENT DTD. 21/11/2001.

EXT.P8 COPY OF THE OBJECTION FILED BY THE PETITIONER.

EXT.P9 COPY OF THE ORDER OF THE COMMISSIONER OF COMMERCIAL TAXES, THIRUVANANTHAPURAM.

P.R. RAMAN, J.

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O.P. NO.4790 OF 2003

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DATED THIS, THE 24TH DAY OF MAY, 2007.

J U D G M E N T

Petitioner is a partnership firm, engaged in the sale of marble, mosaic etc.. He is an assessee for sales tax under the Kerala General Sales Tax Act. Proceedings were initiated against the petitioner under Section 45 A of the said Act by the Intelligence Officer, based on an inspection conducted in the business premises of the petitioner, and on finding that he had suppressed some transactions which were effected with St. Thomas Hospital, Chethipuzha. It was alleged that during 1997-98 and 1998-99 the firm had received an amount of Rs. 9,75,000/- towards consideration thereof, but had not accounted this transaction in the regular books of accounts. By Ext.P4, the Intelligence Officer completed his proceedings and it was found that there was a suppression of the turnover to the tune of Rs. 9,75,000/- out of which an amount of Rs. 1 lakh was suppressed for the year 1997-98 and the balance for the year 1998-99. They were imposed a penalty of an amount of Rs. 14,000/- for the year 1997-98 and Rs.1,22,500/- for the year 1998-99 being double the amount of tax due on the suppressed turnover of Rs.

1,00,000/- and 8,75,000/- respectively for the years 1997-98 and 1998-99. Aggrieved thereby, petitioner preferred a revision before the Deputy Commissioner, Commercial Taxes, Kottaym, who, by order dated 2.1.2001 - a copy of which is produced as Ext.P6 herein, has set aside the order of the Intelligence Officer and remanded the case for fresh consideration. The Commissioner of Commercial Taxes, invoking suo motu power of revision, by his order dated 30.12.2002 - a copy of which is produced as Ext.P9, set aside the order passed by the Deputy Commissioner and restored that of the Intelligence Officer, against which this writ petition is filed.

2. The main contention advanced by the learned counsel for the petitioner is that the order passed by the Deputy Commissioner remanding the case to the Intelligence Officer for a fresh consideration was not an order prejudicial to the Revenue and therefore, the Commissioner of Commercial Taxes could not have invoked the power under Section 37 of the Act. Reliance was also placed on the decision of this Court reported in **Bismillah Trading Co. V. Intelligence Officer, A.I.T. & S.T**. (2000 (2) KLT 73) . But the learned counsel fairly submitted that before the Commissioner of Commercial taxes, no such question was raised; but contended that being a legal question petitioner is entitled to raise the same in the writ petition.

3. As far as the power of suo motu revision is concerned, there are two provisions under the Kerala General Sales Tax Act. Section 37 (1) of the said Act empowers the Board of Revenue to suo motu call for and examine any order passed or proceeding recorded under this Act by any Officer or authority subordinate to it other than an Appellate Assistant Commissioner which in his opinion is prejudicial to revenue and may make such enquiry or cause such enquiry to be made and subject to the provisions of the Act may pass such order thereon as it thinks fit. The procedure and the manner in which the power has to be exercised is also prescribed under sub-section (2) thereof. Subsequent to the abolition of the Board of Revenue, the said power is conferred on the Commissioner of Commercial Taxes. This is a general power of revision. As per sub-section (1) of Section 45A notwithstanding anything contained in Section 46 if the assessing authority or the Appellate Assistant Commissioner is satisfied that any person has failed to keep true and complete accounts or has failed to submit any return as required by the provisions of the Act or the rules made thereunder or committed such other acts as are enumerated under clauses (a) to (h) thereof, then the authority competent can impose by way of penalty an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is practicable to quantify the

evasion or an amount not exceeding Rs. 10,000/- in any other case (as the provisions stands today). Before imposing the penalty, an opportunity of being heard must be afforded to the assessee. Sub-section (3) of Section 45A confers power of revision on the Deputy Commissioner and his order will be final subject to Sub-section (5) thereof.

4. As per Section 45A(5) of the Act, the Board of Revenue may either suo motu or by application, call for and examine the records of any order passed under sub-section (1) or sub-section (3) and make such order as it thinks fit. Thus, Section 45A(5) confers power on the revisional authority suo motu power of revision against the order passed by the Deputy Commissioner which power unlike Section 37 of the Act do not impose any restriction thaht he could exercise the power only if the order sought to be issued is held to be prejudicial to the Revenue.

5. In this case, the penalty imposed is under Section 45A of the Act, by the Intelligence Officer. Revisional power was exercised by the Deputy Commissioner under sub-section (3) of Section 45A and therefore, the Commissioner is empowered to suo motu revise the order passed by the Deputy Commissioner untrammelled by any conditions for the exercise thereof as in the case of power exercisable under Section 37 of the Act. While issuing the notice he has also referred to Section 45A and that

provision itself confers suo motu power to revise the order of the Deputy Commissioner which is an independent, self contained provision. So long as Section 45A(5) do not impose any precondition for the exercise of the power thereunder that the power could be exercised only when it is prejudicial to the revenue, I am unable to accept the contention of the counsel for the petitioner that the power is a restricted one similar to the power under Section 37 of the Act. In Bismillah Trading Company's case (2000(2) KLT 73) the Division Bench had no occasion to consider the scope of the power of the Commissioner under Section 45A(5) of the Act. Rather it proceeded to consider the power under Section 37 and no question was raised in the said case regarding the scope and ambit of power under Section 45A(5) of the Act. Here, the petitioner also did not raise any such contention before the Commissioner pursuant to the notice received by him. In these circumstances, the contention that only if it is prejudicial to the revenue that the power of suo motu revision could be exercised by the Commissioner, is rejected.

6. It was then contended that the order Ext.P9 passed by the Commissioner is erroneous in that amounts were not received by the firm or shown to have received by it and the finding contra is perverse. In this connection, I may refer back to the order passed by the Intelligence Officer

wherein he entered a clear finding of suppression of turnover on the following reasons:

The petitioner firm is admittedly a dealer in mosaic and marbles. It had filed a quotation dated 27.11.1997 to the Director of St. Thomas Hospital, Chethipuzha, specifying the rate at which the goods can be supplied and the labour charges per square feet. The Hospital authorities also made available the measurement sheet of the work partly completed on 13.3.1998 and vouchers for payment of the amount to the dealer. As per the measurement sheet the dealer had executed work for Rs. 1,01,660/- on 13.3.1998 and the amount had been rounded to Rs. 1,00,000/-. As per the voucher and records of the Hospital the dealer had accepted various amounts from the Hospital for the mosaic and marble work on different dates totalling to Rs.9,75,000/-. The amounts were paid through cheque of South Indian Bank Extension Counter, Chethipuzha and vouchers had been obtained by the Bank from the dealer's representative who accepted the cheque. It was Sri. Sebastian Joseph, who is none other than the son of the Manager Sri. P.M. Joseph, who accepted the payment. It was also found that in some cases, other persons deputed by the firm had accepted the cheque on behalf of the dealer after passing telephonic information. The Director of the Hospital affirmed that the work was done by the dealer.

The Investigation team verified the assessment records and it was found that the dealer had declared an amount of Rs. 69,720/- and Rs. 2,27,670/- respectively for the assessment years 1997-98 and 1998-99 as total turnover and the returns were filed by Sri. P.M. Joseph in the power of Authorized Manager. The partners of the firm are all lady members including the wife, daughter and daughter in-law etc. of the Manager. Enquiry further revealed that Sri. P.M. Joseph and Sebastian Joseph are managing the affairs of the firm. Though a sister concern namely, Jojo Marble, Changanasserry was also run by them, of which Sebastian Joseph is the Proprietor, on verification of the accounts of the said firm for 1997-98 to 1999-2000, no transaction was seen done with St. Thomas Hospital during that period. In these circumstances, that the books of accounts of the dealer were called for and verified.

7. It was contended that the firm received only an amount of Rs.1,65,000/- for the Hospital on 17.1.1998 and 13.3.1998 and bills were issued and there was no other transaction during the period with the Hospital. But as disclosed by the various factors as noticed above - the quotation submitted by the firm to the Hospital, the statement of the Director of the Hospital, the books of accounts maintained by the Hospital concerning various payments effected by them through cheques and

accepted by the representative of the firm, the fact that part payment had been admitted by the firm - all will go to show that the finding of the Intelligence Officer that there was suppression of the turnover for the relevant years in question are not only based merely on the quotation submitted by the firm alone, but also based on various pieces of evidence referred to in the order by him. Therefore, the Deputy Commissioner, by setting aside the order holding that the entire case of the Intelligence Officer was built up on the extract of the document dated 27.11.1997 issued in their letter pad to the Director of the St. Thomas Hospital, Chethipuza, etc. are not factually correct. It is not necessary that there should be an agreement between the parties. The finding of the Intelligence Officer that there is suppression of turnover is reasonable and it is a possible conclusion that could be reached on the overall assessment of the entire evidence in the case. As already pointed out, the Intelligence Officer has drawn his conclusion not merely based on the extract of the document dated 27.11.1997, but relying on the factual details also. It was in these circumstances that the Commissioner of Commercial Taxes invoked his power of suo motu revision and passed Ext.P9 order, setting aside the order passed by the Deputy Commissioner and restored that of the Intelligence Officer. The jurisdictional aspect of the matter has already

been dealt with in the first paragraph of the judgment and found that it is well within his power. For the above reasons, I find no reason to interfere with Ext.P9 order do not suffer from illegality or error apparent on the face of the record nor result in any miscarriage of justice so as to invoke the power of this Court under Article 226 of the Constitution of India.

The original petition fails. It is accordingly, dismissed.

P.R. RAMAN,
(JUDGE)

knc/-

P.R. RAMAN, J.
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O.P. NO. 4790/2003
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DATED: 24.5.2007.